A

PP

v.

MANIMARAN MANICKAM

B

COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF FCJ
ABU SAMAH NORDIN JCA
SULONG MATJERAIE JCA
[CRIMINAL APPEAL NO: B-05-358-2010]

C

30 SEPTEMBER 2011
[2011] CLJ JT(4)

CRIMINAL PROCEDURE: *Trial - Plea bargaining - Whether allowable - Process and procedure - Whether request therefor to be made*

D

to Public Prosecutor - Whether judge may indicate likely sentence to be imposed - Whether to be transparent - Whether process to be recorded and to form part of notes of proceedings - Dangerous Drugs Act 1952, ss. 6, 39A(2) - Criminal Procedure Code, s. 376

E

CRIMINAL PROCEDURE: *Sentencing - Plea bargaining - Trafficking in dangerous drugs - Charge reduced to one of possession - Plea of guilty - Dispute on circumstances leading to plea - Doubt whether bargain inclusive of sentence to be imposed - Whether warranting retrial on original charge - Dangerous Drugs Act 1952, ss. 6, 39A(2), 39B(1)(a) - Criminal Procedure Code, s. 376*

F

CRIMINAL PROCEDURE: *Sentencing - Possession of 404 grams of cannabis - Sentenced to six years imprisonment and ten strokes of whipping - Whether inadequate - Dangerous Drugs Act 1952, ss. 6, 39A(2)*

G

In this appeal by the Public Prosecutor against the decision of the High Court sentencing the respondent to six years imprisonment and ten strokes of whipping for an offence under s. 6 read with s. 39A(2) of the Dangerous Drugs Act 1952 (possession of 404

H

grams of cannabis), a question arose as to whether the plea of guilty, and the sentence as passed, was the result of a plea bargaining between the respondent and the prosecution. The respondent alleged that it was, and contended that the appeal was on that account rendered readily unwarranted and

I

unsustainable. The prosecution, while admitting to offering to reduce the charge from trafficking to possession in exchange for a

plea of guilty by the respondent, however strenuously denied that there ever was an agreement between it and the defence as regards sentence. An argument was presumably also taken that it was not customary for judges in this country to have descended into plea bargaining, and indeed – going by the authorities of *R v. Turner* (1970) and *New Tuck Shen v. PP* (1982) – judges both in England and Malaysia were judicially prohibited from participating in plea bargaining. Upon the legal and factual posers thus laid before them, the learned justices of the Federal Court deemed it appropriate and timely to dwell on the issue of the status of plea bargaining in our judicial system, and consequently took the liberty to determine the following questions as well, namely: (i) whether *New Tuck Shen* need no longer be followed; (ii) whether the courts and judges in this country should be allowed to participate in the process of plea bargaining, subject to proper guidelines and safeguards; and (iii) whether the parties here had entered into a plea bargaining, and if so whether such agreement ought to be sanctioned by the Federal Court.

Held (ordering retrial on original charge)
Per Raus Sharif FCJ delivering the judgment of the court:

(1) In England, public policy has over the years departed from *R v. Turner* and shifted towards accepting plea bargaining. The position there as it stands now is that the courts are no longer prohibited in participating in plea bargaining between the prosecution and the defence in regard to sentence, and that a judge is free to indicate a sentence to a defendant who asks as to the likely sentence to be imposed if he pleaded guilty to the charge. (see *R v. Goodyear* (2005); *Mckinnon v. Government of the United States of America* (2008)). (paras 15-17)

(2) In Malaysia, public policy on plea bargaining has also shifted towards the same direction. The recent amendments to the Criminal Procedure Code indicates Parliament's intention in respect of plea bargaining. The new ss. 172C to 172F of the Criminal Procedure Code (Amendment) Act 2010, though yet to be put into force, clearly seeks to formalize the process of plea bargaining in this country *[the new sections were housed in s. 2 of the Amending Act – editor]*. (para 19)

(3) The time has come for our courts to depart from *New Tuck Shen v. PP*. Consequently, and subject to proper guidelines, the presiding judge or magistrate should now be free to indicate the maximum sentence he is minded to impose where the accused person or his counsel sought an indication of his current view of the sentence which would be imposed on the accused. (para 21)

(4) The guidelines for plea bargaining process may be prescribed as follows: (i) the request for plea bargaining must be made by the accused person to the Public Prosecutor and if the application is made to the court, the court must forward same to the Public Prosecutor; (ii) if the application is made by counsel representing the accused, he must get a written authority signed by his client affirming that the client wishes to plea bargain on the sentence; (iii) the prosecution must quickly react to the request, and both parties must reach an agreement, preferably in writing, on the sentence (the minimum and maximum acceptable to them); (iv) the agreement should be placed before the court who, if it so agrees, would impose a sentence that comes within the range as agreed to by the parties; (v) if the court disagrees with the sentence proposed (the judge must retain the unfettered discretion whether to agree with the sentence or not), it must so inform the parties, and it is up to the parties to decide on the next move; and (vi) the process of plea bargaining must be done transparently; it must be recorded and the notes will form as part of the notes of proceedings. (para 21)

(5) In this case, whilst it is apparent that the sentence imposed by the trial judge was based on the plea bargaining process between the prosecution and the defence, it is not known as to how the process of plea bargaining was done or the arrangement on the sentence was reached between the parties. And it is made worse by the fact that the prosecution is denying that there was ever a plea bargaining on the sentence. It is for this reason that we strongly advise that judges and magistrates record the process of plea bargaining. It is unfortunate that this was not done by the learned judge, with the result that we cannot sanction the so called plea bargaining in respect of the sentence that was alleged to have taken place herein. (paras 24 & 25)

(6) The sentence imposed on the respondent is manifestly inadequate and under normal circumstances we would have allowed this appeal. However, on account of the dispute as to the circumstances that led to the respondent pleading guilty to the amended charge, and uncertainty as to whether there was an understanding between the prosecution and the defence, a doubt arose as to whether the plea of guilty by the respondent was an unqualified plea or otherwise. We would however give the benefit thereof to the respondent, and consequently, would set aside the conviction and sentence and remit the case to the High Court for a retrial before another judge on the original charge, without prejudice to the Public Prosecutor's right under s. 376 of the Criminal Procedure Code. (paras 29-31)

Bahasa Malaysia *Translation Of Headnotes*

Dalam rayuan oleh Pendakwa Raya terhadap keputusan Mahkamah Tinggi menjatuhkan hukuman enam tahun penjara dan sepuluh sebatan terhadap responden atas kesalahan di bawah s. 6 dibaca bersama s. 39A(2) Akta Dadah Berbahaya 1952 (memiliki 404 gram ganja) di sini, persoalan berbangkit sama ada pengakuan salah yang dibuat, serta hukuman yang dijatuhkan, sebenarnya berpunca dari suatu perundingan akuan di antara responden dan pendakwaan. Responden mengatakan begitu, sambil berhujah bahawa disebabkan olehnya rayuan telah menjadi tidak wajar dan tidak boleh dipertahankan. Bagaimanapun, pendakwaan, sementara mengakui telah menawar untuk menurunkan pertuduhan dari kesalahan mengedar kepada memiliki, dengan kerasnya menolak bahawa wujud persetujuan di antaranya dengan responden mengenai soal hukuman. Penghujahan kelihatannya telah juga dibangkitkan bahawa adalah tidak menjadi kebiasaan bagi hakim-hakim di negara ini untuk terlibat di dalam perundingan akuan, dan malahan – berdasarkan autoriti-autoriti seperti *R v. Turner* (1970) dan *New Tuck Shen v. PP* (1982) – hakim-hakim di England dan Malaysia adalah secara kehakimannya dilarang untuk turun padang dan mengambil bahagian dalam perundingan akuan. Atas persoalan-persoalan fakta dan undang-undang yang diajukan kepada mereka, yang arif hakim-hakim Mahkamah Persekutuan merasakan sesuai dan wajar untuk menangani isu mengenai kedudukan perundingan akuan dalam sistem kehakiman kita, dan berikutnya mengambil peluang di sini untuk turut menjawab soalan-soalan berikut, iaitu:

A (i) sama ada *New Tuck Shen* tidak harus lagi diikuti; (ii) sama ada mahkamah dan hakim-hakim di negara ini, tertakluk kepada panduan dan syarat-syarat tertentu, harus dibenarkan untuk terlibat dalam perundingan akuan; dan (iii) sama ada pihak-pihak di sini telah memasuki suatu perundingan akuan, dan jika begitu B sama ada persetujuan sedemikian harus dipersahkan oleh Mahkamah Persekutuan.

Diputuskan (memerintahkan perbicaraan semula atas pertuduhan asal)

C **Oleh Raus Sharif HMP menyampaikan penghakiman mahkamah:**

(1) Di England, polisi awam untuk beberapa tahun kebelakangan telah menyimpang dari *R v. Turner* dan bergerak ke arah menerima perundingan akuan. Kedudukan di sana pada masa D sekarang adalah bahawa mahkamah-mahkamah sudah tidak lagi dihalang dari melibatkan diri dalam perundingan akuan di antara pendakwaan dan pembelaaan berhubung dengan hukuman, dan bahawa seseorang hakim adalah bebas untuk menyatakan sesuatu hukuman kepada seorang defendan yang E bertanyakan tentang hukuman yang mungkin dijatuhkan jika beliau mengaku bersalah terhadap pertuduhan. (lihat *R v. Goodyear* (2005); *Mckinnon v. Government of the United States of America* (2008)).

F **(2)** Di Malaysia, polisi awam berhubung perundingan akuan juga menuju ke arah yang sama. Pindaan terbaru kepada Kanun Tatacara Jenayah menyerlahkan niat Parlimen berkaitan perundingan akuan. Seksyen-seksyen baru 172C hingga 172F Kanun Tatacara Jenayah (Pindaan) 2010, walaupun masih G belum dikuatkuasakan, jelas ingin memperakukan proses perundingan akuan di negara ini *[seksyen-seksyen baru tersebut termuat di dalam s. 2 Akta Pindaan – editor]*.

(3) Masanya sudah sampai untuk mahkamah-mahkamah kita H meninggalkan *New Tuck Shen*. Oleh itu, dan tertakluk kepada panduan-panduan wajar, hakim atau majistret yang bersidang kini mempunyai kebebasan untuk menyatakan hukuman maksima yang hendak dijatuhkannya olehnya apabila tertuduh atau peguamnya meminta pandangannya mengenai hukuman I yang akan dijatuhkan oleh beliau terhadap tertuduh.

(4) Panduan-panduan bagi proses perundingan akuan bolehlah dinyatakan sebagai berikut: (i) permohonan untuk perundingan akuan hendaklah dibuat oleh orang tertuduh kepada Pendakwa Raya dan jika permohonan dibuat ke mahkamah, maka mahkamah hendaklah menyampaikannya kepada Pendakwa Raya; (ii) jika permohonan dibuat oleh peguam kepada tertuduh, maka beliau perlulah mendapat mandat bertulis yang ditandatangani oleh tertuduh mengesahkan bahawa anak guamnya itu ingin merundingkan akuannya mengenai hukuman; (iii) pendakwaan hendaklah memberikan tindakbalas dengan segera terhadap permintaan, dan kedua-dua pihak hendaklah mencapai persetujuan, sebaiknya melalui tulisan, mengenai hukuman (minima dan maksima yang boleh diterima oleh mereka); (iv) persetujuan yang dicapai hendaklah dikemukakan ke mahkamah yang, jika ia bersetuju dengannya, bolehlah menjatuhkan hukuman dalam lengkongan seperti yang dipersetujui oleh pihak-pihak; (v) jika mahkamah tidak bersetuju dengan hukuman yang dicadangkan (hakim mestilah memegang budibicara mutlak sama ada untuk bersetuju dengan hukuman atau tidak), mahkamah harus memberitahu pihak-pihak keputusannya itu dan terpulanglah kepada pihak-pihak untuk mengambil langkah selanjutnya; dan (vi) proses perundingan akuan hendaklah dilakukan secara telus; ia hendaklah direkodkan dan seterusnya menjadi sebahagian nota prosiding.

(5) Dalam kes semasa, sementara hukuman yang dijatuhkan oleh hakim bicara kelihatan diasaskan kepada proses perundingan akuan di antara pendakwaan dan pembelaan, tidak diketahui bagaimanakah proses perundingan akuan itu diadakan atau kira mengira mengenai hukuman tersebut dipersetujui oleh pihak-pihak. Kedudukan tambah dikalutkan oleh fakta bahawa pendakwaan menafikan wujudnya sebarang perundingan akuan berkaitan hukuman. Inilah sebabnya mengapa kami dengan kerasnya menasihatkan hakim dan majistret supaya merekodkan proses perundingan akuan. Adalah malang bahawa ini tidak dibuat oleh yang arif hakim, berakibat kami tidak boleh mengesahkan dakwaan perundingan akuan mengenai hukuman sepertimana yang dikatakan berlaku di sini.

(6) Hukuman yang dijatuhkan ke atas responden adalah secara manifestnya tidak memadai dan dalam keadaannya biasa kami tentunya akan membenarkan rayuan ini. Bagaimanapun, memandangkan wujud pertikaian berkaitan halkeadaan yang

membawa kepada responden membuat pengakuan bersalah kepada pertuduhan terpinda, serta ketidakpastian mengenai sama ada wujud perundingan akuan di antara pendakwaan dan pembelaan, maka berbangkit keraguan sama ada pengakuan bersalah oleh responden adalah suatu pengakuan yang tidak bersyarat atau sebaliknya. Apapun kami memberikan manfaat keraguan tersebut kepada responden, dan oleh itu sabitan dan hukuman adalah diketepikan dan kes dikembalikan ke Mahkamah Tinggi untuk perbicaraan semula atas pertuduhan asal di hadapan hakim lain, tanpa memprejudis hak-hak Pendakwa Raya di bawah s. 376 Kanun Tatacara Jenayah.

Case(s) referred to:
Haryadi Dadeh v. PP [2000] 3 CLJ 553 FC ***(refd)***
Mckinnon v. Government of the United States of America [2008] 1 WLR 1739 ***(foll)***
New Tuck Shen v. PP [1982] CLJ 38; [1982] CLJ (Rep) 606 HC ***(ovrd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
R v. Goodyear [2005] 3 All ER 117 ***(foll)***
R v. Turner [1970] 2 All ER 281 ***(not foll)***
Subramaniam Arumugam v. PP [2000] 2 CLJ 1 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 376
Dangerous Drugs Act 1952, ss. 6, 39A(2), 39B(1)(a)
Prevention of Corruption Act 1961, s. 4(b)

For the appellant - Saiful Edris Zainuddin (PG Cyril with him) DPPs
For the respondent - Rajpal Singh (Amrit Pal Singh & K Theivaendran with him); M/s Rajpal & Assocs

[Appeal from High Court, Shah Alam; Criminal Appeal No: 45A-9-2010]

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Raus Sharif FCJ:

Introduction

[1] This is an appeal by the Public Prosecutor against sentence. The respondent was sentenced by the High Court Shah Alam for six years imprisonment and ten strokes of whipping after he pleaded guilty to an amended charge of being in possession of 404 grams of cannabis, an offence under s. 6 of the Dangerous Drugs Act 1952 ("DDA") and punishable under s. 39A(2) of the DDA.

[2] The penalty for committing an offence under s. 6 when read with s. 39A(2) of the DDA is "imprisonment for life or a term which shall not be less than five years", and "shall also be punished with whipping of not less than ten strokes". A

[3] We heard the appeal on 19 May 2011. After hearing the parties, we adjourned the matter for our consideration and decision. We now give our decision and the reasons for the same. B

Facts

[4] Briefly the facts leading to this appeal are these. On 4 June 2010, the respondent was produced before the High Court Shah Alam to face a charge of trafficking dangerous drugs ie, 404 grams of cannabis, an offence under s. 39B(1)(a) of the DDA which carries the death penalty. A hearing date was fixed on 1 September 2010. C D

[5] On the hearing date, the learned Deputy Public Prosecutor ("DPP") informed the High Court that the prosecution was making an offer to the respondent to amend the charge from trafficking to that of possession. The learned counsel for the respondent sought for the case to be stood down to enable him to seek instructions from his client. The case was stood down to 11.30am on the same day. E

[6] When the case was called up again, the learned DPP tendered the amended charge. The charge reads: F

> Bahawa kamu pada 10 Ogos 2009 jam lebih kurang 3.30 petang bertempat di alamat No. C-9-23, No. 2, Rumah Pangsa, Rampai Idaman, Jalan PJU 10/9, Prima Damansara, Sungai Buloh di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, telah memiliki dadah berbahaya iaitu cannabis seberat 404 gram dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 6 Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39A(2) Akta yang sama. G

[7] The respondent pleaded guilty to the amended charge. On request of the learned counsel, the case was adjourned to the next day to enable him to prepare for the respondent's plea in mitigation. H

I

[8] On 2 September 2010, after hearing the learned counsel submission, on the plea in mitigation and the reply from the learned DPP, the learned trial judge sentenced the respondent to six years imprisonment and ten strokes of whipping.

Submissions

[9] Before us, the learned DPP, En Saiful Edris bin Zainuddin (En P.G Cyril with him) submitted that the sentence passed by the High Court Judge was manifestly inadequate. He argued that a heavier custodial sentence ought to be meted out against respondent. The Federal Court cases of *PP v. Mohd Radzi Abu Bakar PP* [2006] 1 CLJ 457, *Haryadi Dadeh v. PP* [2000] 3 CLJ 553 and *Subramaniam Arumugam v. PP* [2000] 2 CLJ 1 were cited to support his arguments.

[10] The learned defence counsel, En Rajpal Singh (En Amrit Pal Singh and En K Theivaderan with him) submitted that the Public Prosecutor should not have appealed in this case. He contended that the sentence imposed by the High Court was a result of a plea bargaining between the defence and prosecution. According to him, the respondent had pleaded guilty to the amended charge on the understanding that the sentence imposed by the court would be the sentence earlier agreed between the prosecution and the defence. He urged us to uphold the sentence imposed against the respondent.

[11] The learned DPP, in his reply, submitted that there was no such agreement between the prosecution and the defence. According to learned DPP, the offer by the prosecution was limited to a reduction of the charge from trafficking to that of possession, on the condition that the respondent will plead guilty to the amended charge.

Decision

(a) Plea Bargaining

[12] In Malaysia, the issue of plea bargaining was discussed in the case of *New Tuck Shen v. Public Prosecutor* [1982] CLJ 38; [1982] CLJ (Rep) 606. In that case, New Tuck Shen ("appellant") was charged in the Sessions Court with an offence under s. 4(b) of the Prevention of Corruption Act 1961. It was

alleged by the appellant's counsel that an understanding had been reached between him and the learned DPP wherefore, in return for the appellant pleading guilty to the charge, the learned DPP would leave the matter of sentence to the court. The appellant, in consequence, pleaded guilty to the charge, admitted the facts and was convicted by the court. The defence counsel in his plea in mitigation requested for non-custodial sentence. However, the learned DPP, in his reply, pressed for a deterrent sentence. The appellant's counsel protested the learned DPP's conduct and applied to retract the appellant's plea. The learned President of the Sessions Court, stood firm in his acceptance of the plea, and sentenced the appellant to six months imprisonment.

[13] The High Court Judge, Wan Yahya J (as he then was) in dismissing the appellant's appeal quoted and relied heavily on the English case of *R v. Turner* [1970] 2 All ER 281. In *R v. Turner*, the English Court of Appeal held that a judge should firstly never give an indication as to the sentence that he is minded to impose, and secondly, he is never bound to follow any private bargaining between the prosecution and the defence in regard to sentence.

[14] Wan Yahya J (as he then was) citing *R v. Turner*, similarly said:

> This court does not consider it bound by the private bargaining between the prosecution and the defence in respect of which bargaining it is not a party and in which it has been judicially prohibited to participate.

[15] However, over the years, public policy has shifted towards accepting plea bargaining. In *R v. Goodyear* [2005] 3 All ER 117, the English Court of Appeal decided differently from *R v. Turner*. A five men bench, presided by Lord Woolf, set up specifically to decide on plea bargaining said:

> (1) **The rule of practice that a judge should never indicate the sentence which he is minded to impose** (subject to the exception that it is permissible for him to say that the defendant pleads guilty or not guilty the sentence will or will not take a particular form) **no longer need be followed in circumstances where a defendant personally instructs his counsel to seek an indication from the judge** of his current view of the maximum sentences which would be imposed on the defendant. (emphasis added)

[16] The departure from *R v. Turner* was cited with approval in the House of Lords in *Mckinnon v. Government of the United States of America* [2008] 1 WLR 1739. The House of Lords agreed with *R v. Goodyear*'s reasoning by stating:

> ... essentially that a judge may respond to defendant's request that he be told the maximum sentence that it would be imposed on a plea of guilty but is not to volunteer such information unasked ...

[17] Thus, the position in England as it now stands is that a judge is free to indicate a sentence to a defendant who asks or instruct his counsel to ask as to the likely sentence to be imposed, if he pleaded guilty to the charge. The courts are no longer prohibited in participating in plea bargaining between the prosecution and the defence in regard to sentence.

[18] In Malaysia, public policy on plea bargaining has also shifted towards the same direction. The recent amendments of the Criminal Procedure Code is a clear intention of Parliament in respect of plea bargaining. The new ss. 172C to 172F of the Criminal Procedure Code (Amendment) Act 2010 provide as follows:

> 172C. (1) An accused charged with an offence may make an application for plea bargaining in the Court in which the offence is to be tried.
>
> (2) The application under subsection (1) shall be in Form 28A of the Second Schedule and shall contain -
>
> (a) A brief description of the offence that the accused is charged with;
>
> (b) A declaration by the accused stating that the application is voluntarily made by him after understanding the nature and extent of the punishment provided under the law for the offence that the accused is charged with; and
>
> (c) Information as to whether the plea bargaining applied for is in respect of the sentence or the charge for the offence that the accused is charged with.
>
> (3) Upon receiving an application made under subsection (1), the Court shall issue a notice in writing to the Public Prosecutor and to the accused to appear before the Court on a date fixed for the hearing of the application.

(4) When the Public Prosecutor and the accused appear on the date fixed for the hearing of the application under subsection (3), the Court shall examine the accused *in camera* -

(a) where the accused is unrepresented, in the absence of the Public Prosecutor; or

(b) where the accused is represented by an advocate, in the presence of his advocate and the Public Prosecutor,

as to whether the accused has made the application voluntarily.

(5) Upon the Court being satisfied that the accused has made the application voluntarily, the Public Prosecutor and the accused shall proceed to mutually agree upon a satisfactory disposition of the case.

(6) If the Court is of the opinion that the application is made involuntarily by the accused, the Court shall dismiss the application and the case shall proceed before another Court in accordance with the provisions of the Code.

(7) Where a satisfactory disposition of the case has been agreed upon by the accused and the Public Prosecutor, the satisfactory disposition shall be put into writing and signed by the accused, his advocate if the accused is represented, and the Public Prosecutor, and the Court shall give effect to the satisfactory disposition as agreed upon by the accused and the Public Prosecutor.

(8) In the event that no satisfactory disposition has been agreed upon by the accused and the Public Prosecutor under this section, the Court shall record such observation and the case shall proceed before another Court in accordance with the provisions of the Code.

(9) In working out a satisfactory disposition of the case under subsection (5), it is the duty of the Court to ensure that the plea bargaining process is completed voluntarily by the parties participating in the plea bargaining process.

[19] The Amendment Act 2010, though had been passed by the Parliament, had not been put into force yet. But the clear intention was to formalise the process of plea bargaining. However, even before the introduction of the above provisions, plea bargaining between the defence and prosecution frequently

takes place in our courts. But they are normally confined to instances of the accused pleading guilty to lesser charges or to one of several charges in exchange for withdrawal of the rest.

[20] There are also instances where the accused person pleads guilty to the charge in exchange of the prosecution not pressing for deterrent sentence. It is a common occurrence that in such situation both the prosecution and the defence will approach the presiding judge or the magistrate. More often than not the presiding judge or magistrate will indicate the range of sentence that he or she will impose. This was what Wan Yahaya J in *New Tuck Shen v. Public Prosecutor (supra)* wanted to avoid ie, the court should never give an indication as to the sentence that it is minded to impose.

[21] However, we are now of the view that the time has come for our courts to depart from the decision of *New Tuck Shen v. Public Prosecutor (supra)* in prohibiting the courts from being involved in plea bargaining. The presiding judge or the magistrate should be free to indicate the maximum sentence he or she is minded to impose where the accused person or his counsel sought an indication of his current view of the sentence which would be imposed on the accused. But proper guidelines must be followed. We are proposing the following guidelines:

(i) The request for plea bargaining must come from the accused person. The application must be made by the accused person to the Public Prosecutor. If an application is made to the court, the court must forward the same to the Public Prosecutor. The application may also be made by counsel representing the accused person. In such situation, the counsel must get a written authority signed by his client that he, the client, wishes to plea bargain on the sentence. And it is the counsel's duty to ensure that his client fully appreciates that he should not plead guilty unless he is guilty of the offence;

(ii) Once there is a request from the defence, the prosecution must be quick to react. Both must reach an agreement on the sentence ie, the minimum and the maximum sentence that the prosecution and defence can accept as the punishment. The agreement is preferably to be in writing. Once there is an agreement reached between the defence and the prosecution, it must be placed before the court. If the court agrees, the

judge or magistrate should indicate his or her agreement to the parties. And the sentence imposed must be within the range agreed to between the parties.

(iii) However, if the court disagrees with the sentence proposed by the prosecution and the defence, it must accordingly inform the parties and indicate the sentence it would be imposing. It is up to the parties to decide on the next move. If there is no agreement, the case should go for trial. The agreement of the court is vital because in whatever circumstances, the judge retain the unfettered discretion whether to agree with the sentence to be imposed or otherwise.

(iv) The process of plea bargaining must be done transparently. It must be recorded and the notes will form as part of the notes of proceedings.

[22] The problem in the present case is that the process of plea bargaining was not recorded. There is nothing in the notes of proceedings that indicate there was in fact a plea bargaining process that took place between the prosecution and the defence on the sentence. What we have is what was said by the learned trial judge in his grounds of judgment which reads:

> Saya juga mengambilkira praktis plea bargaining yang dijalankan oleh Peguambela dan Timbalan Pendakwa Raya di mana perkara ini telah dimaklumkan kepada Mahkamah.

[23] Further, towards the end of the judgment the learned trial judge concluded by stating:

> Akhir sekali saya berpendapat bahawa 6 tahun penjara dan 10 kali sebatan rotan untuk kes ini adalah selaras dengan plea bargaining yang dicapai oleh Peguambela dan Timbalan Pendakwa Raya.

[24] It appears from the grounds of judgment of the learned trial judge that the sentence imposed was based on the plea bargaining process between the prosecution and the defence. But it is not known how the process of plea bargaining was done and how the agreement on the sentence was reached between the parties. What makes it worse in this case is that the prosecution is denying that there was in fact a plea bargaining on the sentence.

[25] It is for this reason, we strongly advise the judges and magistrates to record the process of plea bargaining. Judges and magistrates must record exactly what transpires before them in respect of the plea bargaining process. It is unfortunate in this case, that it was not done. As such, and with regret, we could not sanction the so called plea bargaining in respect of the sentence that was alleged to have taken place before the learned trial judge.

Sentence

[26] The question now remains whether we should allow the Public Prosecutor's appeal. On the facts of this case, we have no hesitation to state that the sentence of six years imprisonment and ten strokes of whipping imposed against the respondent was manifestly inadequate.

[27] It had been said again and again that the public interest called for a deterrent sentence in drugs related cases. The Federal Court cases referred by the learned DPP, is a clear indication of strong concern by our courts in offences relating to possession of dangerous drugs. In *PP v. Mohd Radzi Abu Bakar (supra)*, the accused was sentenced to 18 years imprisonment and ten strokes of whipping for possession of 342.1 grams of cannabis. In *Haryadi Dadeh v. Public Prosecutor (supra)*, the accused was sentenced to ten years imprisonment and ten strokes of whipping for possession of 251.60 grams of cannabis. While in *Subramaniam Arumugam v. Public Prosecutor (supra)*, the accused was sentenced to 12 years imprisonment and ten strokes of whipping for possession of 236.07 grams of cannabis. Thus, in the present case, we feel that the sentence of six years imprisonment and ten strokes of whipping for possession of 404 grams of cannabis is clearly out of step with the sentences imposed by the Federal Court on similar cases.

[28] We would like to take this opportunity to remind the prosecution not to leave this difficult area of sentencing only to the court. The prosecution must assist the court. The DPPs in asking for deterrent sentence must produce authorities to back their argument. They must show the trend of sentencing in similar cases. They must also produce statistics to back their facts as to why the court needs to impose a deterrent sentence.

[29] Back to the issue as to whether we should allow the Public Prosecutor's appeal. Under normal circumstances, we would have done so. However, in this case, it appears that there is a dispute as to the circumstances that led to the respondent pleading guilty to the amended charge. The respondent is claiming that he had pleaded guilty to the amended charge on the understanding that the sentence imposed by the court would be the sentence earlier agreed between the prosecution and the defence. Such understanding is being disputed by the prosecution. As stated earlier, the problem is, nothing is being recorded by the learned trial judge other than what he had said in his grounds of judgment.

[30] Clearly there is uncertainty whether there was such an understanding between the prosecution and the defence. As such we are in doubt as to whether the plea of guilty by the respondent was an unqualified plea. We are giving the benefit of the doubt to the respondent.

[31] Thus, in all fairness to the prosecution and the defence, we hereby set-aside the conviction and sentence. We make an order that the case be remitted before the High Court in Shah Alam for a retrial before another judge. The retrial is on the original charge without prejudicing the right of the Public Prosecutor under s. 376 of the Criminal Procedure Code.